



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA  
DARWIN REGISTRY**

**BETWEEN:**

**COMMONWEALTH OF AUSTRALIA**

Appellant

and

**YUNUPINGU ON BEHALF OF THE GUMATJ CLAN  
OR ESTATE GROUP**

First Respondent and others named in the Schedule

**OUTLINE OF ORAL SUBMISSIONS OF THE SECOND RESPONDENT**

## Part I: Certification

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1. This outline of oral submissions is in a form suitable for publication on the internet.

## Part II: Propositions to be advanced in oral argument

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### A. GROUND 1: THE SECTION 122 ISSUE

2. ***Commonwealth's eight propositions.*** The Commonwealth's propositions reduce to two alternative contentions that (a) s 51(xxxi) does not qualify s 122 because the former is exclusively federal and the latter is exclusively non-federal (Propositions 1-4); and (b) it would be incongruous to require the Commonwealth to pay just terms to acquire land in a territory (Proposition 7). The former is contrary to text, principle and authority: ss 51(xxxi), 52(i), 122 and 125; *Schmidt* (1961) 105 CLR 361, 371-372 (**V 3 T 55**); *Lamshed* (1958) 99 CLR 132, 141, 143-4 (**V 9 T 85**). The latter is negated by the Commonwealth's imposition on itself of a requirement to pay just terms for acquisitions of land in the Territory: *Northern Territory (Administration) Ordinance 1910* (Cth), s 9 (**V 2 T 10**).
3. ***Construction.*** Section 51(xxxi) controls s 122 in all its operations: **NT[9]**; *Newcrest* (1997) 190 CLR 513, 561, 591-614, 652-661 (**V 12 T 95**); *Wurridjal* (2009) 237 CLR 309, [73]-[86], [175]-[189], [283]-[288] (**V 19 T 126**).
  - (a) s 51(xxxi) applies to an acquisition "for any purpose in respect of which the Parliament has power to make laws". Section 122 contains such a power: **NT[29]**;
  - (b) s 51(xxxi) protects any "person", including a person in a territory, and applies to an acquisition of the property of a "State" in a territory: **NT[22]-[23]**;
  - (c) the word "Commonwealth" in the chapeau to s 51 includes the territories: **NT[22]**; *Wurridjal* (2009) 237 CLR 309, [74] (**V 19 T 126**);
  - (d) s 51(xxxi) is to be given a "liberal construction": **NT[17]**; *Clunies-Ross* (1984) 155 CLR 193, 201-202 (**V 5 T 66**);
  - (e) s 51(xxxi) abstracts from other (general) heads of power, such as s 122: *Schmidt* (1961) 105 CLR 361, 371-372 (**V 3 T 55**); **NT[18], [31]**. Whether just terms would be "incongruous" depends upon the nature of the law, not on the source of the power *per se*: *Emmerson* (2014) 253 CLR 393, [77] (**V 3 T 57**); **NT[19], [45]**;
  - (f) although plenary, s 122 is limited by other parts of the Constitution, and it is not disjoined from the rest of the Constitution merely because it was placed in Ch VI: **NT[30], [37]**; *Spratt* (1965) 114 CLR 226, 242 and 246 (**V 15 T 112**);
  - (g) it is irrelevant that s 122 is not made expressly "subject to this Constitution": **NT[26]**; *Newcrest* (1997) 190 CLR 513, 606 and 653 (**V 12 T 95**).

4. The Commonwealth denies this on three bases. The first is that it should be in the same position as the States when it legislates under s 122: **CS[19], [48]; CR[4]**. That false equivalence finds no basis in the constitutional text: **NT[46]-[50]**. The Constitution preserves the States' constitutions without a just terms guarantee, but empowers the Commonwealth to acquire property only on just terms: ss 51(xxxi), 106-108.
5. Secondly, the Commonwealth says that s 122 must be flexible to allow it to govern diverse territories: **CS[47]; CR[2], [4]**. Section 122, flexible though it is, is subject to limitations found elsewhere in the Constitution: **NT[26], [30]**. Further, the presence of s 51(xxxi) presupposes that its strictures would not unduly restrict the Commonwealth: **NT[43]**. Section 51(xxxi) qualifies s 51(vi) even in times of total war: **NT[42]**. Finally, the submission is ahistorical. The Commonwealth imposed on itself and the Territory analogue restrictions: *Northern Territory (Administration) Ordinance 1910* (Cth), s 9 (**V 2 T 10**); *Northern Territory (Self-Government) Act 1978* (Cth), s 50 (**V 2 T 14**).
6. Thirdly, the Commonwealth says that s 51(xxxi) is a federal limitation and, when enacting laws under s 122, the Parliament is not acting as the federal legislature but as a local legislature: **CS19], [48]; CR[4]**. That is wrong. A law made under s 122 is made by the Parliament as the national legislature and may have important federal effects: **NT[32]-[36]; Lamshed** (1958) 99 CLR 132, 141-4, 153-154 (**V 9 T 85**).
7. **Precedent.** The Commonwealth must re-open *Wurridjal*. The *ratio* is the legal rule adopted by a majority of judges as a necessary step in reaching their conclusion: **CR[19]**. A demurrer operates like separate questions of law: *JM* (2013) 250 CLR 125, [32]-[34] (**V 7 T 72**); **NT[76]**. In such cases, a majority is formed for each question. Kirby J joined with French CJ, Gummow and Hayne JJ to reject ground 1: *Wurridjal* (2009) 237 CLR 309, [86], [189], [287] (**V 19 T 126**). Alternatively, *Teori Tau* should be re-opened and overruled: **NT[79]-[82]**. It is inconsistent with the constitutional text, is contrary to principle, and was considered wrong by four judges in *Wurridjal*. The Commonwealth does not oppose re-opening *Teori Tau*, if necessary.

## **B. GROUND 3: THE RESERVATION ISSUE**

8. The Full Court's reasons raise two questions: (a) whether the Crown asserted any rights through the mineral reservation in PL 2229 (**ABFM 155-160**); and (b) if so, whether the rights so asserted were inconsistent with any native title rights to those same minerals: **NT[85]**.

9. ***The first question.*** The Full Court’s construction of the mineral reservation as merely ‘holding back’ the minerals from the lessee (**CAB 53 [59]; 67 [107], [109]**) was erroneous. The reservation both held back minerals from the grant, and asserted positive rights in all the minerals and the Crown’s right to take all the minerals:
- (a) The lease instrument and Schedule A to the 1899 Act distinguish between reservations, exceptions and covenants. In the context of the instrument and 1890 and 1899 Acts, reservation has its common law connotation of asserting rights on the part of the Crown as lessor: **ABFM 155; NT[95], [97], [109]**.
  - (b) The reservation also positively asserted a right for the Crown to take or authorise others to take *all* the minerals: **NT[96], [99]**.
  - (c) The Full Court mischaracterised the statutory scheme: **NT[96],[99]-[109]**.
  - (d) The characterisation of a ‘reservation’ in *Wade* was predicated on the view that the Crown already owned the minerals: *Wade* (1969) 121 CLR 177, 189, 194 (**V16 T119**). In light of the post-*Mabo No. 2* understanding that the Crown held only a radical title, characterisation of the reservation as a mere holding back is inapt: *Wik* (1996) 187 CLR 1, 184 (**V 18 T 124**); *Congoo* (2015) 256 CLR 239, [115]-[116] (**V14 T103**); *NSWALC* (2016) 260 CLR 232, [112] (**V10 T92**).
  - (e) This Court’s decision in *Wik* is distinguishable: 187 CLR 1, 68 (**V 18 T 124**); *Mining on Private Land Act 1909* (Qld) (**V2 T29**); **NT[90]-[94], [110]**.
10. ***The second question.*** The reservation asserted exclusive possession of that part of the land comprising the minerals, inconsistent with the continued existence of native title to those same minerals: **NT[111]-[119]**; *Wik* (1996) 63 FCR 450, 501 (**V21 T146**); *Payne* (2013) 46 WAR 128, [78], [86], [88] (**V20 T141**). The lease instrument “reserve[ed]... under His Majesty” all minerals within the area leased: **ABFM 155**. “Reservation” is used elsewhere in the statutory scheme to connote ownership of minerals: 1890 Act ss 8, 31 (**V2 T37**); **NT[101]-[102]**. This accorded with the legislative history and colonial policy, which required the minerals to be available for the public benefit: **NT[112]-[114]**. The Crown’s right to take the minerals was inconsistent with the claimed native title right: **NT[115]-[116]**.

Dated: 8 August 2024

**Nikolai Christrup**

**Stephen Wright**

**Lachlan Peattie**

**IN THE HIGH COURT OF AUSTRALIA  
DARWIN REGISTRY**

**SCHEDULE**

**Northern Territory of Australia**  
Second Respondent

**East Arnhem Regional Council**  
Third Respondent

**Layilayi Burarrwanga**  
Fourth Respondent

**Milminyina Valerie Dhamarrandji**  
Fifth Respondent

**Lipaki Jenny Dhamarrandji (nee Burarrwanga)**  
Sixth Respondent

**Bandinga Wirrpanda (nee Gumana)**  
Seventh Respondent

**Genda Donald Malcolm Campbell**  
Eighth Respondent

**Naypirri Billy Gumana**  
Ninth Respondent

**Maratja Alan Dhamarrandji**  
Tenth Respondent

**Rilmuw murr Rosina Dhamarrandji**  
Twelfth Respondent

**Wurawuy Jerome Dhamarrandji**  
Thirteenth Respondent

**Manydjarri Wilson Ganambarr**  
Fourteenth Respondent

**Wankal Djiniyini Gondarra**  
Fifteenth Respondent

**Marrpalawuy Marika (nee Gumana)**  
Sixteenth Respondent

**Guwanbal Jason Gurruwiwi**  
Eighteenth Respondent

**Gambarrak Kevin Mununggur**  
Nineteenth Respondent

**Dongga Mununggurritj**  
Twentieth Respondent

**Gawura John Wanambi**  
Twenty First Respondent

**Mangutu Bruce Wangurra**  
Twenty Second Respondent

**Gayili Banunydji Julie Marika (nee Yunupingu)**  
Twenty Third Respondent

**Bakamumu Alan Marika**  
Twenty Fifth Respondent

**Wanyubi Marika**  
Twenty Sixth Respondent

**Wurrulnga Mandaka Gilngilngma Marika**  
Twenty Seventh Respondent

**Wityana Matpupuyngu Marika**  
Twenty Eighth Respondent

**Northern Land Council**  
Twenty Ninth Respondent

**Swiss Aluminium Australia Limited (ACN 008 589 099)**  
Thirtieth Respondent

**Telstra Corporation Limited (ABN 33 051 775 556)**  
Thirty First Respondent

**Arnhem Land Aboriginal Land Trust**  
Thirty Second Respondent

**Amplitel Pty Ltd**  
Thirty Third Respondent

**Attorney-General for the State of Queensland**  
Thirty Fourth Respondent